APPENDIX I

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Wednesday the 27th day of April, 1966.

Robert Elmer Rowe,

Petitioner,

against

C. C. Peyton, Superintendent of the Virginia State Penitentiary,

Respondent.

Upon a Petition for a Writ of Habeas Corpus

Upon mature consideration of the petition of Robert Elmer Rowe for a writ of habeas corpus ad subjiciendum, and the answer of the respondent to the rule to show cause entered herein on December 2, 1965, and the petitioner's reply thereto, the court doth find that the petitioner is presently detained pursuant to a judgment of the Circuit Court of Augusta County on June 18, 1963, wherein he was sentenced to serve a term of thirty years in the Virginia State Penitentiary, having been convicted of rape; that the petitioner is not now detained in pursuance to the judgment of which he complains, and the writ of habeas corpus lies only to attack the validity of the petitioner's present detention.

For the foregoing reasons, the court is of opinion that the writ should not issue as prayed. It is, therefore, adjudged and ordered that the petition for a writ of habeas corpus be dismissed, the rule discharged, that the respondent recover of the petitioner his costs by him expended about his defense herein, and that Bernard H. Cross, Esquire, who was

appointed by this court to represent the said petitioner in this proceeding, be allowed the sum of $100, for services rendered herein, his costs and necessary expenses, which amount shall be recovered by the Commonwealth, together with all unpaid fees and costs in this cause which are to be taxed by the clerk.

A Copy,

Teste:
/s/ H. G. TURNER
Clerk

Respondent's Costs:	
Attorney's fee	$50.00
Commonwealth's costs:	
Tax	$ 1.00
Clerk's fee	10.00
Fee allowed court-appointed attorney	100.00

Testee:
/s/ H. G. TURNER
Clerk

APPENDIX II

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

ROBERT ELMER ROWE

v.

C. C. PEYTON, Superintendent of the Virginia State Penitentiary

66-C-27-H

Memorandum Order

Petitioner was convicted of rape in the Circuit Court of Augusta County on June 18, 1963 and is presently serving a valid thirty year sentence imposed upon him at that time. After exhausting his state habeas corpus remedies, he comes before this court and collaterally attacks another sentence imposed upon him by the Waynesboro City Circuit Court on June 24, 1963 for secreting a female. If this second sentence barred his present eligibility for parole, the ground for his attacking it could be considered, but this is not the case. The record shows that if Rowe's twenty (20) year sentence imposed by the Circuit Court of Waynesboro City on June 24, 1963 did not exist, his parole eligibility date would be August 24, 1969. Whether he has a valid ground for attacking his second sentence is not now relevant because his attack is premature. *McNally* v. *Hill*, 293 U.S. 131 (1934). In accordance with the above it is

ORDERED

that prisoner's petition for a writ of habeas corpus is denied and it is further

ORDERED

that the petitioner be and hereby is granted leave to proceed on appeal in forma pauperis from this order.

It appearing to the Court that the petitioner raises no substantial question, it is further

ORDERED

that if the petitioner wishes to appeal, an application for a certificate of probable cause will be denied by this Court.

If the petitioner wishes to appeal, he must file written notice of appeal with this Court within thirty days from the entry of this order.

If the petitioner wishes to appeal, the Clerk of this Court is directed to transmit the record on appeal to the United States Court of Appeals for the Fourth Circuit.

Let the Clerk send copies of this order to the petitioner and the Attorney General of Virginia.

ENTER: October 26, 1966.

/s/ THOMAS J. MICHIE
United States District Judge

A TRUE COPY, TESTE:

Leigh B. Hanes, Jr., Clerk

By: /s/ DAISY H. NALLE
Deputy Clerk

APPENDIX III

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

Civil Action
No. 5011

CLYDE MASON THACKER

v.

C. C. PEYTON, Superintendent of the
Virginia State Penitentiary

Memorandum Of The Court

Clyde Mason Thacker's application for a writ of habeas corpus will be denied without prejudice.

Thacker was permitted to proceed in forma pauperis. The respondent answered and Thacker replied.

Thacker attacks three sentences imposed by the Circuit Court of Hanover County on November 16, 1953, on pleas of guilty. Each sentence was for five years suspended. The suspensions were revoked March 19, 1956.

Thacker contends that these sentences are invalid because he had no legal counsel until the day of trial, he was coerced into pleading guilty, and had no counsel at the revocation proceedings.

Thacker is not presently serving these sentences. The respondent is detaining him pursuant to a judgment of the Circuit Court of Buckingham County entered September 17, 1964, which sentenced him to a term of four years in the penitentiary upon conviction of breaking and entering.

The sentence Thacker presently is serving will expire April 7, 1967. Thereafter he will begin service of a one-year sentence imposed by the Circuit Court of the City of Charlottesville, which will be followed by additional sentences imposed by that court and the Circuit Court of Greene County, the Circuit Court of Albemarle County and the Circuit Court of Madison County.

The court considered the validity of these sentences in a plenary hearing, *Thacker* v. *Peyton*, Civil Action No. 4628-M, July 12, 1966, *now pending on appeal*, No. 10,949, 4th Cir.

On December 23, 1964 a parole which had previously been given to Thacker was revoked. He has to serve nearly twenty-seven years upon the revocation. Included in this

are the sentences imposed in the Circuit Court of Hanover County. He will not begin serving these sentences until November 8, 1997.

Both the respondent and Thacker are in agreement that the sentences which he attacks do not prevent him from being eligible for parole. If the sentences were declared invalid, he still would not be eligible for parole. Thacker cannot attack these sentences under the principle expressed in *Martin* v. *Virginia,* 349 F.2d 781 (4th Cir. 1966). The limitations upon Martin are clearly stated in *Tucker* v. *Peyton,* 357 F.2d 115, 117 (4th Cir. 1966), where the court said:

> "* * * [W]e recently held in Martin v. Com. of Virginia, 4 Cir., 349 F.2d 781, that a prisoner could attack a sentence he had not yet begun to serve if, at the time, he would be eligible for parole if the questioned sentence were invalid. Petitions for the writ need not require adjudication of academic questions, but they should be readily entertained if directed to a conviction which currently substantially impinges upon the applicant's liberty. That is the plain teaching of Jones v. Cunningham [371 U.S. 236 (1962)]."

The writ will be denied without prejudce to Thacker's reapplication at the proper time.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

February 1, 1967

APPENDIX IV

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 11,072.

Robert Elmer Rowe,
Appellant,

versus

C. C. Peyton, Superintendent of the
Virginia State Penitentiary,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, AT HARRISONBURG.
THOMAS J. MICHIE, DISTRICT JUDGE.

No. 11,217.

Clyde Mason Thacker,
Appellant,

versus

C. C. Peyton, Superintendent of the
Virginia State Penitentiary,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA, AT RICHMOND. JOHN D. BUTZNER, JR., DISTRICT JUDGE.

(Argued June 19, 1967. Decided August 28, 1967.)

Before HAYNSWORTH, Chief Judge and SOBELOFF, BOREMAN, BRYAN, WINTER and CRAVEN, Circuit Judges, sitting en banc.

John J. Kirby, Jr., (Court-assigned counsel) for Appellants, and Reno S. Harp, III, Assistant Attorney General of Virginia, (Robert Y. Button, Attorney General of Virginia, on brief) for Appellee.

HAYNSWORTH, Chief Judge:

We are asked to decide whether or not any remedy is available to state prisoners seeking to attack, on constitutional grounds, state sentences to be served in the future which have no present effect upon consideration of the prisoners for parole. We think that the traditional writ of habeas corpus is available to serve the clearly present need of a procedural device to test the legality of these convictions under the Constitution of the United States.

I

In 1963 Rowe was convicted of rape in Staunton, Virginia and a sentence of 30 years was imposed upon him. Three days later, in Waynesboro, Virginia, he was arraigned for the felonious abduction with intent to defile the same female of whose rape he had been convicted in

Staunton. A plea of former jeopardy was overruled, whereupon, on advice of counsel, Rowe tendered a plea of guilty. Rowe alleged that he had been told by his lawyer that any sentence imposed upon him in Waynesboro would be required to run concurrently with the thirty year sentence imposed upon him in Staunton for the rape. However, the Court imposed upon him a sentence of 20 years to run consecutively to the sentence on the rape charge, and he was committed to the penitentiary to serve the two consecutive sentences totalling fifty years.

Rowe will not begin to serve the sentence imposed upon him in Waynesboro for abduction until the year 1993. Because, under Virginia law, a prisoner, regardless of the length of his sentence, may be considered for parole after serving twelve years, Rowe is presently scheduled to become eligible for parole in 1975. If the second sentence is invalidated, Rowe's eligibility for parole will be advanced to late 1970 or early 1971.

Rowe has not attacked the first conviction for rape. He has sought to attack in the state and federal courts his second conviction, the one for abduction, on grounds of former jeopardy and of involuntariness of his guilty plea which, he alleged, was induced by the misadvice given him and the indifference of his trial counsel. Virginia concedes that, on the merits, the petition states a prima facie claim of invalidity of the abduction conviction which, if substantiated at a hearing, would require that the conviction be vacated.

II

In 1964 Clyde Thacker was committed to the Virginia State Penitentiary to serve a number of sentences totalling sixty years, four months and sixteen days. He seeks to attack three sentences which are presently scheduled to

commence in service in 1994 and to end in the year 2004. They were imposed upon him in 1953, but were suspended. The suspension was revoked in 1956.

Because of the rule of eligibility for consideration for parole after service of twelve years, Thacker will become technically eligible for such consideration in 1976. That date will not be advanced even if the three sentences under attack are vacated.

Thacker seeks to attack these three sentences upon the ground of inadequate representation by his trial counsel at the time of his convictions in 1953. The factual allegations facially show such gross neglect by the lawyer of his client's interests that, were the alleged facts established in a hearing, Thacker would be entitled to have those sentences vacated. As in Rowe's case, the Commonwealth concedes that Thacker's petition sufficiently states a constitutional claim and cannot be dismissed without a hearing if there is any appropriate remedy.

III

It is thus apparent that in 1971 when Rowe's conviction for abduction begins to affect his eligibility for consideration of parole, he will be permitted to attack that conviction.[1] On the basis of the allegations of his present petition he will be entitled to a hearing.

When Thacker becomes eligible for parole in 1976 he, too, will be allowed to attack his 1953 convictions for, while these convictions do not affect the parole eligibility date, their presence on his record is strongly calculated to weigh heavily against the grant of parole.[2] The question is whether, meanwhile, Rowe and Thacker must patiently wait until the challenged convictions begin to hurt them in

[1] Martin v. Virginia, 4 Cir., 349 F.2d 781.

[2] Williams v. Peyton, 4 Cir., 372 F.2d 216.

terms of an immediate potential parole. The answer involves a more fundamental question, whether the courts are powerless to provide an effective remedy to vacate constitutionally defective convictions at a time when witnesses are available and their memories relatively fresh, when it is certain that, if the prisoner survives so long, there will be an available remedy some years hence.

IV

At the outset it is objected that Thacker has not pursued available state remedies. It is true that he has not, but Rowe has. His petition was rejected by the Supreme Court of Appeals of Virginia without an opinion, but in light of the factual allegations of the petition, that rejection must have been upon the procedural ground that Rowe was not presently serving the sentence he seeks to attack.[3] Thacker should not be required to travel the same road through the state courts to present a question which the Virginia Supreme Court of Appeals has so recently decided, when there is no indication that it is now prepared to depart from the former course of its decisions.[4]

V

It is further objected by the Commonwealth that the question of availability of remedies has not been presented to the Supreme Court of Appeals of Virginia in the lucid fashion in which it has been developed in this Court. This Court was concerned about the question and undertook to have it fully developed here by granting certificates of probable cause to appeal and appointing an exceptionally able

[3] That is the rule in Virginia, Peyton v. Williams, 206 Va. 595, 145 S.E. 2d 147 (1965).

[4] Evans v. Cunningham, 4 Cir., 335 F.2d 491.

lawyer who has filed a very enlightening brief. While academicians may speculate about a decision of a court in light of the quality of the advocacy as indicated by the briefs filed in the case, that is a role we should not undertake in resolving questions of exhaustion of state remedies. If the question was clearly tendered, as it was in Rowe's and other cases, and decided by the State Court, we must accept the decision as an authoritative declaration of state law even if, upon an examination of the briefs filed in the state court, we are of the opinion that they were less comprehensive and less helpful than the briefs which have been filed in this Court. Appellate courts can be greatly assisted by inspired counsel, but counsel's performance contains neither the measure nor the limit of the court's perception or analysis; Judges may know and understand many relevant things that are not intelligently discussed by lawyers in a particular case. Even when lawyers perform superbly, as they have in this case, all of the tools of decision may not be found in the briefs.

VI

We thus reach the merits of the procedural question of present availability of a federal remedy for the adjudication of constitutional validity of these state sentences to be served in the future.

The "Great Writ" has deep antecedents in the English common law as a procedural device for protecting and extending the jurisdiction of courts. As an effective weapon, for the protection of individual liberties from monarchial interference, it evolved in the Seventeenth Century, in the course of a great constitutional crisis.[5] As such it was im-

[5] For a very perceptive review of the writ's history *see* J. D. Meador, *Habeas Corpus and Magna Carta,* University of Virginia Press (1966).

ported into this country as a shield against authoritarian commitments under orders of the Crown. Available, too, for the procurement of bail for bailable offenses,[6] and for the questioning of private restraints upon individual liberties, it was not envisioned as an instrument for questioning judicial authority except in the narrowest of jurisdictional senses. The writ was unavailable to one held for trial or convicted of a felony in a court having jurisdiction of the offense and of the person of the petitioner.[7] When no sentence of a court having jurisdiction was subject to attack on habeas corpus, there was no justiciable problem of sentences to be served in the future.

When, by the Act of February 5, 1867,[8] the federal writ was extended to persons held under state commitments in violation of the Constitution, laws or treaties of the United States, our present problem still did not arise. While the statute might have been construed more broadly, the current understanding of the limitations of the writ was so definitive that the jurisdictional concept remained in full flower. A state court's commitment was not questionable in a federal habeas corpus proceeding if the offense was triable in the state court and the prisoner subject to its power.[9] There was no substantial crack in that conceptual limitation until 1915 when, in *Frank* v. *Mangum*,[10] the

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[6] *See* the Habeas Corpus Act of 1679, 31 Car. II c.7, 8 *Statutes at Large* 432-39 (1763).

[7] *Ex parte* Parks, 93 U.S. 18 (1876); *Ex parte* Watkins, 28 U.S. (3 Pet.) 193 (1830).

[8] 14 Stat. 385 (1867). The present version is 28 U.S.C.A. §§ 2241, 2243 (1958).

[9] *Ex parte* Bridges, 4 Fed. Cas. 98, 106 (No. 1862) (Cir. Ct. N.D. Ga. 1875) (Mr. Justice Bradley). The same rule applied to federal prisoners. *Ex parte* Parks, 93 U.S. 18 (1876).

[10] 237 U.S. 309 (1915). It had some precursors in *Ex parte* Siebold, 100 U.S. 371 (1879), and *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

Court assumed that a state court having jurisdiction might be ousted of it by the overriding influence of a mob.[11]

Even under this relaxing concept of "jurisdiction," which viewed some judgments as void, rather than voidable, the writ offered little encouragement to a prisoner oppressed with a sense of injustice in the imposition of a sentence to be served in the future. Nevertheless, such a case did reach the Supreme Court in 1934.[12] McNally complained of a sentence imposed upon him on the third count of a three count indictment. His contention was that the third count was so defective as to oust the court of jurisdiction to impose any sentence. He lost in the lower courts on the ground that the defect in the indictment was not so egregious as to make the sentence void, rather than voidable,[13] but the Supreme Court, bypassing that question, held that the writ was unavailable to question a sentence to be served in the future. That holding, so crucial here, will be considered in detail hereafter.

It was not until *Brown* v. *Allen*[14] that any great vista was opened to state prisoners seeking federal habeas corpus to attack state court convictions. It was then held that the writ was available to state court prisoners complaining of denials of federal constitutional rights in their trials. That vista, however, was greatly circumscribed by the limitation that the federal claim must have been clearly raised and prosecuted through the state courts.[15] It was not until 1963 that the circumscriptions of *Brown* v. *Allen* (Daniels v. Allen) were clearly and finally abandoned in *Fay* v. *Noia*.[16]

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[11] Even so, the question of the mob's influence was held to have been foreclosed by the state appellate court's negative appraisal of it.

[12] McNally v. Hill, 293 U.S. 131 (1934).

[13] McNally v. Hill, 3 Cir., 69 F.2d 38.

[14] 344 U.S. 443 (1953).

[15] Brown v. Allen (Daniels v. Allen), 344 U.S. 443, 482-87 (1953).

Meanwhile, there had been a rapid expansion of the meaning of the due process and equal protection clauses of the Fourteenth Amendment. A state prisoner had no incentive to question his conviction upon grounds of absence of counsel, inadequate performance of counsel or a multitude of other grounds until decisions came down making such deprivations matters of constitutional dimension.

It is thus apparent that the present procedural problem had no immediate urgency until very recently when the extension of the writ to obtain federal adjudication of federal constitutional issues arising during the state court proceedings[17] and the freeing of the writ's availability from technical limitations arising out of state court procedural requirements,[18] combined with the currently proceeding reinterpretation of the due process and equal protection clauses of the Fourteenth Amendment, to include within their reach many things now becoming to be regarded as of fundamental fairness.[19] A few years ago, the question whether habeas corpus was available to attack a sentence to be served in the future was of little more than academic interest; today it has become a question of pressing importance to vast numbers of prisoners with colorable claims upon which to found attacks upon successive and subsequent sentences.

The problem we face simply did not exist in the Seventeenth Century. Now that recently it has arisen, if there is a substantive right crying for a remedy, it seems most inappropriate to approach a solution in terms of a Seventeenth Century technical conception which had no relation to the context in which today's problem arises.

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[16] 372 U.S. 391 (1963).

[17] Brown v. Allen, 344 U.S. 443 (1953).

[18] Fay v. Noia, 372 U.S. 391 (1963).

[19] *See generally,* Meador, *supra,* note 5.

As we have noted, the Supreme Court dealt with this problem in 1934, before it became acute, in *McNally* v. *Hill*,[20] and it then supplied the doctrinare answer. McNally was serving the second of three consecutive sentences when he sought habeas corpus to attack the third. He had served enough of the second sentence to be eligible for consideration for parole if the third sentence were invalid, but, since he was being held under the concededly valid second sentence and his immediate release could not be ordered by the court, the Supreme Court held that habeas corpus was unavailable to him. The prisoner's only purpose in seeking habeas corpus was to establish his eligibility for parole, and the Supreme Court thought that might be done by a petition for mandamus to require the Parole Board to entertain a petition for parole. The Supreme Court thought McNally should have an available remedy, but held habeas corpus the wrong route.

Since *McNally* v. *Hill* the Supreme Court has not dealt directly with the problem,[21] but it has embraced a more liberal, less technical concept of the writ. This is exemplified in such cases as *Jones* v. *Cunningham*, 371 U.S. 236 (1963), and *Fay* v. *Noia*, 372 U.S. 91 (1963). The new approach is thoroughly inconsistent with the narrowly tech-

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[20] McNally v. Hill, 293 U.S. 131 (1934).

[21] It came close to it in *Ex Parte* Hull, 312 U.S. 546 (1941), in which a prisoner was allowed to attack a second conviction which resulted in revocation of his parole and his recommitment under the earlier sentence, though he was held under the concededly valid first sentence. *Ex parte* Hull is not necessarily inconsistent with *McNally* v. *Hill*, but it was a significant departure from a mechanistic application of the old rule that habeas corpus is unavailable unless the court's order will procure the prisoner's immediate release. Heflin v. United States, 358 U.S. 15 (1959), may be regarded as an affirmation of *McNally* v. *Hill*, for while the federal prisoner there was allowed to attack the future sentence under Rule 35 of Fed. R. Crim. P.; five members of the Court were of the opinion that relief was unavailable under 28 U.S.C.A. § 2255.

nical one of *McNally*. The change seemed so apparent to us that, in *Martin* v. *Commonwealth of Virginia*,[22] when we were faced with the precise *McNally* v. *Hill* issue, we concluded that the Supreme Court today would not follow it when the conviction under attack had a present adverse effect upon the prisoner's eligibility for parole. This Court, of course, must follow the Supreme Court, but there are occasional situations in which subsequent Supreme Court opinions have so eroded an older case, without explicitly overruling it, as to warrant a subordinate court in pursuing what it conceives to be a clearly defined new lead from the Supreme Court to a conclusion inconsistent with an older Supreme Court case. That we did in *Martin*, and we took the matter one further step in *Williams* v. *Peyton*,[23] in permitting a prisoner to attack a future sentence, though he was already eligible for parole, since the fact of the future sentence to be served was strongly calculated to influence the Parole Board's action. In each of these cases we departed from the strict holding in *McNally*. We considered it no longer controlling authority, and we will adhere to that view until the Supreme Court has an opportunity to declare what, if any, vitality that case presently retains. Certainly, *McNally's* doctrinaire approach and its dealing with the problem in terms of the old jurisdictional concept have been thoroughly rejected by the Supreme Court in recent cases.

Here, we are asked by the prisoners, of course, to go beyond the strict limits of our holdings in *Martin* and *Williams*, for the future sentences under attack here have no present effect upon their being considered for parole. While *Martin* and *Williams* represent a significant departure from

[22] 4 Cir., 349 F.2d 781.
[23] 4 Cir., 372 F.2d 216.

the historic conception that the writ of habeas corpus was available only if the court's order would procure the immediate release of the prisoner, they were founded upon the notion that the future sentence under attack had an immediate inhibiting effect upon the petitioner's chances of obtaining conditional release on parole. To the extent that the future sentences had such an effect in *Martin* and in *Williams,* their vacation would procure the prisoner's immediate release from them. The further step we are asked to take in this case cannot be founded upon precisely the same rationale, but we have concluded that taking it is both logical and necessary.

Virginia's Attorney General seems to recognize in this case the desirability of some present remedy by which the constitutionality of these future sentences may be determined. It is certain that each of these prisoners will suffer decided detriment from them in the future, unless death in the interim relieves him of all of his burdens. If he is compelled to wait the many years until he commences service of them, or even for those several years until the future sentence has an adverse impact upon his being considered for parole, all responsible officials who participated in the trial, judge, prosecutor, lawyer, clerk and reporter, may have died, or the case have become so dim in their memories that they could contribute nothing as witnesses. If there is not now a transcript of stenographic notes of the proceedings, there is great likelihood that it would be unavailable many years hence, and unless there is a present remedy by which the substantive questions can be raised, no court has authority to require production of a transcript of such proceedings.

Enforced delay from lack of a remedy over a period of many years is, itself, a decided detriment to the prisoner.

He may lose the only means by which he may substantiate his claim. It is an even greater potential detriment to Virginia. Years hence, the prisoner, at least, may be expected to give testimonial support to the allegations of his petition, but if they are false in fact, the Commonwealth of Virginia may be unable to refute them because of the unavailability of records and of the testimony of responsible officials and participants in the trial. The greater the lapse of time, the more unlikely it becomes that the state could reprosecute if retrials are held to be necessary. It is to the great interest of the Commonwealth and to the prisoner to have these matters determined as soon as possible when there is the greatest likelihood the truth of the matter may be established. Justice delayed for want of a procedural, remedial device over a period of many years is, indeed, justice denied to the prisoner and, in an even larger degree, to Virginia.[24]

While agreeing that provision of a present remedy would be a desirable reform, however, the Commonwealth suggests that it is a legislative matter. With this, we must disagree.

The writ of habeas corpus is not the creature of a legislature. It was a device fashioned by the common law courts to protect and extend their own jurisdiction.

In the Seventeenth Century it developed into the "Great Writ" so prized in Colonial America. In the process, it was assisted by the Petition of Right, enacted by the Parliament in 1728 to extend the writ to bring into question commitments under orders of the Crown,[25] and it received

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[24] We have previously expressed the great desirability of remedial procedures to achieve an early disposition of collateral attacks on criminal judgments. See Williams v. Peyton, 4 Cir., 372 F.2d 216; Mathis v. United States, 4 Cir., 369 F.2d 43; Martin v. Virginia, 4 Cir., 349 F.2d 216. So has the Supreme Court. United States v. Smith, 331 U.S. 469, 476 (1947).

[25] *See generally;* Meador, *supra,* Note 5.

procedural assistance in its codification in the Habeas Corpus Act of 1679,[26] but the writ was essentially the product of judicial innovation.

In this country, in Article I Section 9 of the Constitution, it was provided that the privilege of the writ shall not be suspended except when required by the public safety in times of rebellion or invasion. The Judiciary Act of 1789[27] authorized the federal courts to grant such writs, but the nature and scope of the writ was to be found neither in Article I of the Constitution nor in the Judiciary Act of 1789.

Until 1867 the writ was available in a federal court only to question federal detention. Occasions for its use were infrequent, and in most instances it was employed to question detention of individuals by the military authority acting under executive orders.[28]

By the Act of February 5, 1867[29] the federal writ was extended to procure the release of persons held in state custody in violation of the Constitution, laws or treaties of the United States. That statutory authorization, now embodied in 28 U.S.C.A. § 2241, was, unquestionably, a congressional extension of the federal writ to reach cases of state custody, but it was not immediately recognized as having expanded the scope of the writ or altered its other procedural requirements.

Thus, it was held in *Ex parte Parks*,[30] just as it had been

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[26] 31 Car. II c.7, 8 *Statutes at Large*, 432-39 (1763).

[27] 1 Stat. 81 c. 20 § 14 (1789).

[28] *See Ex parte* McCardle, 74 U.S. (7 Wall.) 506 (1869); *Ex parte* Milligan, 71 U.S. (4 Wall.) 2 (1866); *Ex parte* Merryman, 17 Fed. Cas. 144 (No. 9487) (Cir. Ct. D.Md. 1861) (Chief Justice Taney).

[29] 14 Stat. 385 c. 28 (1867).

[30] 93 U.S. 18 (1876).

held earlier in *Ex parte Watkins*,[31] that a prisoner serving a sentence imposed by a court of competent jurisdiction had no recourse to habeas corpus. *Ex parte Parks* was concerned with a federal prisoner, but the scope of the writ was the same whether the petitioner was a state or a federal prisoner. This is clear from the statute.[32]

In the remainder of the Nineteenth Century there was little advance from that level, except that certain major defects were treated as jurisdictional.[33]

The great flowering of the writ was a mid-Twentieth Century phenomenon starting tentatively with *Frank* v. *Mangum*, budding in *Brown* v. *Allen* and blossoming with *Fay* v. *Noia*. Those tremendous developments of the writ were entirely judicial, not legislative, and if they owe some debt to a permissive construction of the Act of 1867, it was a construction discoverable only by Twentieth Century judges.[34]

When the writ as it is known today, therefore, is almost entirely the product of judicial innovation and adaptation to fit it to new situations and newly felt needs, judges should not hesitate to take a further step to adapt it to meet yet another need which is present, urgent, and recognized, even by the state.

We need not speculate about the matter, however; the Supreme Court has declared that habeas corpus "is not now and never has been a narrow, formalistic remedy; its scope has grown to achieve its grand purpose."[35] The statement

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[31] 28 U.S. (3 Pet.) 193 (1830).

[32] *See also Ex parte* Bridges, 4 Fed. Cas. 98, 106 (No. 1862) (Cir. Ct. N.D. Ga. 1875) (Mr. Justice Bradley), which did involve a state prisoner.

[33] *Ex Parte* Siebold, 100 U.S. 371 (1879); *Ex parte* Lange, 85 U.S. (18 Wall.) 163 (1873).

[34] *See* United States v. Hayman, 342 U.S. 205 (1952).

[35] Jones v. Cunningham, 371 U.S. 236, 243 (1963).

is historically accurate, and it epitomizes the governing principle of our decision.

The law today abhors a right without a remedy just as the common law did. The genius of the common law was the improvisation of remedies to obtain adjudication of substantive rights. The generative capacity did not end with the first or second generation. It is vigorously present today. If common law pleading became overly technical and debate tended to veer toward appropriateness of the writ the suitor had invoked, we, in this day of simplified pleading, should not lose sight of our judicial heritage of a continuing evolution of remedial processes to right asserted wrongs. If, despite the general abandonment of the technically difficult common law pleading in favor of a system in which the court supplies the appropriate remedy for the right asserted, we would be untrue to our judicial inheritance if we dealt ungenerously with rights still affected by the vestiges of technical limitations applied in an earlier era to common law pleadings. Our recitation of its history discloses that the writ of habeas corpus has not been a static thing. There is nothing in that history to suggest that it should be restricted to the need of a much earlier time.

Taking our direction from *Jones* v. *Cunningham's* declaration of the potentiality for growth of the writ of habeas corpus to achieve its purpose, and from *Fay* v. *Noia's* assurance of "the fullest opportunity for plenary federal judicial review"[36] and the necessity for "swift and imperative justice on habeas corpus,"[37] we conclude that we are not bound in the circumstances of these cases by the historic requirement for availability of the writ that the court's order may pro-

[36] 372 U.S. 391, 424 (1963).

[37] *Id.* at 435.

cure the immediate release of the prisoner.[38] Nor does that historic requirement limit us to the *Martin* and *Williams* situations in which the sentence under attack prevents the prisoner's being considered for parole or has an inhibiting effect upon the granting of parole. So far as the historic limitation is concerned, we conclude that the writ is available to attack any sentence, service of which will be required in the future by the same custodian who presently detains the prisoner.

This is not the end of our inquiry, however, for the statute provides that "(c) The writ of habeas corpus shall not extend to a prisoner unless— . . . (3) He is in custody in violation of the Constitution or laws or treaties of the United States . . . ."[39] The statute says nothing about the court's order being able to procure a prisoner's immediate release, and the statutory requirement of custody is subject to reasonable interpretation consistent with the general purpose of the writ and its development in more recent cases in the Supreme Court.

In a technical sense, each of the prisoners here is presently serving only one of the sentences imposed to run consecutively, but in a substantive and practical sense Rowe is serving a total commitment of 50 years and Thacker one of more than 64. For purposes of determining parole eligibility, Virginia treats the aggregate time imposed by consecutive sentences as "the term of imprisonment."[40] To the prisoner, members of his family, and fellow prisoners it matters little how the order of sentence service is listed by the clerk in the superintendent's office. The one significant,

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[38] *See also Ex parte* Hull, 312 U.S. 546 (1941), in which, as we have noted, the Supreme Court departed from that requirement.

[39] 28 U.S.C.A. § 2241 (1958).

[40] Va. Code Ann. § 53-251 (1967).

substantive thing is the aggregate length of his successive sentences to be served, for they govern entirely his hope for ultimate release whether by parole or by complete sentence service.

The administrative computation of the sequence of sentence service is a flimsy basis to determine the right of access to the courts for a determination of substantial constitutional claims. Virginia might, if it wished, have them served in inverse order, and an interruption in service does result in substantial changes in the order of service. In one of the cases here, Thacker seeks to attack convictions imposed upon him in 1953, but he is administratively said to be serving a sentence imposed upon him much later.[41] For a number of reasons, there must be an administrative determination of the sequence of sentence service, but however it is done, it is an arbitrary, mechanical thing subject to subsequent variation and adjustment. When the one important, substantive fact is the aggregate of all of the successive sentences a prisoner is required to serve, his right of access to the courts should not be conditioned upon the sequence in which the state chooses to list consecutive or successive sentences for service.

It is only in a highly technical sense, therefore, that each of these prisoners may be said not to be serving the sentence he seeks to attack. In a substantive sense, each is serving each of the sentences for the service of which he was committed, regardless of the sequence in which Virginia has listed them for service.

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[41] *See* Peyton v. Williams, 206 Va. 595, 145 S.E.2d 147 (1965), upholding postponement in service of an earlier sentence from which the prisoner had been released on parole until completion of service of a later sentence which occasioned his recommitment and, later, parole revocation. The converse procedure occasioned the question with which the Supreme Court dealt in *Ex parte* Hull, 312 U.S. 546 (1941).

The custody requirement of the statute has not been applied in this country in a mechanical and restricted way. In *Jones* v. *Cunningham,*[42] a parolee was held in sufficient custody to meet the requirements of the writ. We, in *Thomas* v. *Cunningham,*[43] recognized the predominating, substantive fact that a prisoner is in custody for the service of future sentences as well as the one he is administratively considered to be serving. Of the six consecutive two year sentences imposed upon Thomas, we said: "Furthermore, every preceding term was a factor in the detention under every succeeding one, because Thomas was held not only for service of the current term but as well to satisfy the subsequent terms."[44] We have also felt ourselves so unrestricted by administrative determination of sentence service as to permit a prisoner to attack a sentence which, according to the administrative record, had been fully served but the removal of which from the record, with advancement of the commencement of service of the valid terminal sentence to the time of commitment, would result in his immediate release.[45] The fact that Virginia attributed his earlier years of service to invalid sentences and his current service to a concededly valid sentence did not prevent our going to the substance of the matter.

We come to a similar conclusion here. Virginia is holding both of these prisoners not only for service of the sentence which administratively each is said to be currently serving, but for service of the subsequent ones as well. Each of them is in custody within the meaning of the statute under each of the consecutive sentences for the service of

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[42] 371 U.S. 236 (1963).

[43] 4 Cir., 335 F.2d 67.

[44] *Id.* at 69.

[45] Tucker v. Peyton, 4 Cir., 357 F.2d 115

which he was committed, and he is presently entitled to test the constitutionality of any such sentence.

While, as we observed earlier, the rationale of *Martin* and *Williams* does not dictate our conclusion here, for neither of these prisoners, in any event, will be eligible for parole, that circumstance is not crucial to the conclusion that Virginia is holding these prisoners for service of the aggregate terms of all sentences under which they have been committed. A substantive view of the matter and the relevant precedents of more recent years lead us here to the same result we reached in *Martin* and *Williams*.

Ours is a reasonable interpretation of the custodial requirement of the statute.[46] It is made particularly appropriate by the necessity of a present remedy to avoid unconscionable and injudicious delay of many years in the adjudication of justiciable claims of constitutional dimensions.

VII

Having reached the conclusion that habeas corpus is available to these prisoners, we have no occasion to consider the alternative contention that they are entitled to a declaratory judgment. The alternative contention poses a number of difficult problems;[47] the remedy to serve the pressing need for an undelayed judicial determination of these substantial claims of constitutional deprivations should be the traditional one in this area, habeas corpus. If, after a hearing, any of these convictions under attack is found to be invalid, the court may order the Warden to strike it

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[46] *See also* note 48, *infra*.

[47] *See* Note, *Postconviction Remedies: The Need for Legislative Change*, 55 Geo. L.J., 851, 875-6 (1967).

from the administrative records and, henceforth, to hold the prisoners for service of the valid convictions only.[48]

For the foregoing reasons, we conclude that the orders dismissing these petitions without a hearing were erroneous.

Reversed and remanded.

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[48] We have been concerned with the construction of 28 U.S.C.A. § 2241, which has been construed in *pari materia* with 28 U.S.C.A. § 2255. The latter section extends the writ to a federal prisoner "in custody . . . claiming the right to be released . . .," and it has been suggested that the right to release clause of § 2255 poses some conceptual difficulty in the way of our construction of § 2241. If, as we have seen, however, the detention in a substantive sense is under each of two consecutive sentences, the prisoner may be effectively released from all of the burdens of the invalid sentence by the writ's execution. The right to release clause need not be construed as requiring a claim that he be set outside the prison's walls free of the restraint of the other valid sentence. Surely, it would not be given that construction if the sentence under attack was the one which the Warden said administratively was the one then being served. As we have said, the Warden's administrative determination of the sequence of sentence service is a technical irrelevance.

APPENDIX V

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

MAY TERM 1967

No. 9195

CHRISTOFORO RAMON VIALPANDO,

Appellant,

vs.

WAYNE K. PATTERSON, Warden of the Colorado State Penitentiary,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO

Cannon Harvey (Judson W. Detrick on the brief) for Appellant.

James F. Pamp (Duke W. Dunbar, Attorney General; Frank E. Hickey, Deputy Attorney General; James F. Pamp, Assistant Attorney General, on the brief) for Appellee.

Before JONES*, SETH and HICKEY, Circuit Judges.

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* of the Fifth Circuit, sitting by designation.

PER CURIAM:

The appellant, while serving a sentence of a court of Colorado in a prison of that state, attempted to escape and was sentenced, following a plea of guilty, for felonious escape. He was given a five year sentence to run consecutively with the sentence previously given. His good time accrual under his first sentence was forfeited by the attempted escape. He asserted, by a petition for habeas corpus, that because of the forfeiture of good time, he was placed in double jeopardy when charged for the escape as a separate offense. He also claims the information against him was improper, insufficient and violative of the Due Process Clause of the Federal Constitution.

The appellant is now confined by the State of Colorado under the first sentence. The validity of this sentence is not questioned. Granting the writ as to the second sentence would not effect the appellant's release.

In a leading case the Supreme Court, citing or making reference to Bacon's Abridgment, Hale's Pleas to the Crown, Coke's Institutes and many recent authorities, stated the principle in these words:

> "The purpose of the proceeding . . . was to inquire into the legality of the detention, and the only judicial relief authorized was the discharge of the prisoner or his admission to bail, and that only if his detention was found to be unlawful." McNally v. Hill, 293 U.S. 131, 55 S.Ct. 24, 79 L.Ed. 238.

In another leading case it was stated:

> "Habeas lies to enforce the right of personal liberty; when that right is denied and a person confined, the federal court has the power to release him. Indeed,

it has no other power; it cannot revise the state court judgment; it can only act on the body of the petitioner." Fay v. Noia, 372 U.S. 391, 83 S.Ct. 822, 9 L.Ed.2d 837.

Among the many cases of this Court in which the doctrine has been stated and applied are Carpenter v. Crouse, 10th Cir. 1966, 358 F.2d 701; Osborne v. Taylor, 10th Cir. 1964, 328 F.2d 131, cert. den. 377 U.S. 1002, 84 S.Ct. 1936, 12 L.Ed. 2d 1051, reh den. 379 U.S. 874, 85 S.Ct. 25, 13 L.Ed. 2d 82; McGann v. Taylor, 10th Cir. 1961, 289 F.2d 820, cert. den. 368 U.S. 904, 82 S.Ct. 182, 7 L.Ed. 2d 98.

Since the district court was without power to discharge the prisoner from custody, its order denying the petition for habeas corpus was a proper one.

That order is

AFFIRMED.